Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1977

No. 76-1753

WALTER R. CONLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on March 17, 1977.

Opinion Below

The opinion of the Court of Appeals, reported at F.2d , is reproduced in the Appendix hereto. The order and judgment of conviction of the United States District Court for the Western District of New York is also reproduced in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 17, 1977. A timely motion for rehearing was denied in an Order dated May 10, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the presentation by the Government in its direct case of testimony by two F.B.I. agents that the defendant remained silent at the time of his arrest and in the wake of his *Miranda* warnings and requested counsel constituted a reversible error.

Statement of the Case

The defendant Walter R. Conlin was charged in a fifteen-count indictment by the Federal Grand Jury of the Western District of New York on October 10, 1974. The defendant was charged with thirteen counts of violating Title 26 of the United States Code, §7206(2) (preparing false and fraudulent tax returns for the years 1972 and 1973); one count in violation of Title 18, United States Code, §2071(a) (destroying Government records in possession of the Small Business Administration); and one count in violation of Title 18, United States Code, §1001 (submitting a false loan application to the Small Business Administration).

The jury trial of this matter commenced on March 24, 1976 and concluded on April 8, 1976, at which time the jury returned a verdict of guilty on ten of the fifteen counts charged in the indictment and the defendant was found not guilty on the remaining five counts. The defendant was sentenced by United States District Court Judge Harold P. Burke on May 10, 1976 to concurrent terms of two years each on the counts upon which he was found guilty. The Court suspended the execution of the

sentence, and placed the defendant on probation for a period of two years and imposed a fine totaling $5,000.00.

The defendant filed a notice of appeal on May 18, 1976 with the United States Court of Appeals for the Second Circuit, and on May 17, 1977 that Court affirmed the conviction. The petitioner filed a timely petition for rehearing with a suggestion for a rehearing in banc and in separate orders which were entered on May 10, 1977. The Court of Appeals denied the petition.

Reasons for Granting the Writ

POINT I

The Court of Appeals erred in concluding that the Government did not commit reversible error in introducing testimony of the defendant's silence at the time of his arrest and in the wake of his *Miranda* warnings.

The defendant Walter Conlin, who is a Public Accountant, was arrested by F.B.I. agents on January 18, 1974 at the Elmira, New York office of the Small Business Administration and charged with destroying Government records. This arrest was prompted by the defendant's seizure of copies of the income tax returns of Thomas Gill who Conlin had accompanied that morning to the SBA office.

In the Government's direct case, it initially presented testimony from Mr. James Cristofero of the SBA who met with Conlin and his client and who summoned the F.B.I. agents to the scene after Conlin refused to return copies of Gill's tax returns. On cross-examination of this witness,* defense counsel inquired as to what Conlin had stated to the witness when he refused to return the tax returns. The witness maintained that Conlin did not give an exculpatory statement, and no questions were asked of Cristofero regarding what Conlin had stated, if anything, to the F.B.I. agents.

Following Cristofero's testimony, the Government presented testimony from F.B.I. Agents Richard R. Rudy and Robert Bucher.** Both witnesses repeatedly referred in their direct examination to the *Miranda* warnings given to the defendant in

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*The pertinent direct and cross-examination of Mr. Cristofero is contained in the attached Appendix.

**The direct examination of Agents Rudy and Bucher is contained in the attached Appendix.

the SBA office, his refusal to answer their questions as well as his request that counsel be present. The defense attorney timely objected to the introduction of this testimony, and the objection was overruled.

In its opinion dated March 17, 1977, the Court of Appeals approved the introduction of this evidence and stated as follows at page 2379:

> "During the cross-examination of Mr. Cristofero, Conlin's counsel went squarely to the issue of what was said by Conlin to the witness or to the F.B.I., seeking an admission that Conlin had from the outset told Cristofero that he had brought the documents with him to the office that day and that he intended merely to leave with what he had brought. This was the version later testified to by Conlin himself."
>
> "When it became apparent that Conlin was adopting the position that he had spoken throughout the episode and had told both the SBA and F.B.I. officials that he had brought the documents with him on January 18, the U.S. Attorney brought out what he understood to be the facts . . ."
>
> "Appellant's contention concerning the making of exculpatory statements raised an issue which the Government was entitled to meet."

It is abundantly clear that the Court of Appeals erred in concluding that defense counsel's cross-examination of a previous witness served as the basis for the Government to introduce the otherwise inadmissible testimony.

A. *The legal principles enunciated by this Court preclude the introduction of the defendant's silence at the time of his arrest.*

Even before the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), it had become an established constitutional principle that a defendant's Fifth Amendment rights were

violated if the prosecution introduces evidence of his silence at the time of arrest or at a pre-trial proceeding or comments on the defendant's silence at the time of trial. *Bram v. United States*, 168 U.S. 532, 562 (1897), *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), *Wilson v. United States*, 149 U.S. 60 (1893) and *Griffin v. California*, 380 U.S. 609 (1965).

Furthermore, in *Grunewald v. United States*, 353 U.S. 391 (1955) the Court held that it was reversible error when a defendant was cross-examined at the time of trial regarding his silence at a previous Grand Jury proceeding. See also *Johnson v. United States*, 318 U.S. 189, 196-199 (1942).

With the issuance of the opinion in *Miranda v. Arizona*, *supra*, a new area of protected silence was established. The Court referred to this protected area when it stated at page 468 in footnote 24:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

In *United States v. Hale*, 422 U.S. 71 (1975) this Court expanded the above principle and held that reversible error occurred when the defendant was cross-examined and forced to admit that he remained silent at the time of his arrest, even though he gave an exculpatory version in his direct testimony. The Court affirmed the reversal of the conviction not on constitutional grounds, but on its supervisory authority over Federal Courts. More recently, the Court in *Doyle v. Ohio*, 44 U.S.L.W. 4902, 49 L. Ed. 2d 91 (June 17, 1976), held that in a State Court trial the defendant was denied his Fourteenth Amendment right when the prosecution cross-examined him with respect to his silence at the time of his arrest.

Based upon the above, it is quite evident that the prosecution is prohibited from commenting on the defendant's silence at the time of trial by either introducing in its direct case evidence of the defendant's silence at the time of his arrest or at any pre-trial proceeding. Furthermore, the prosecution is prohibited from cross-examining the defendant who testifies on his own behalf and gives an exculpatory version of his conduct, although he remained silent at the time of his arrest.

B. *The exception noted in* Doyle v. Ohio, supra, *is not applicable to the instant case.*

The only justification for the introduction of a defendant's silence at the time of his arrest was referred to in *Doyle v. Ohio, supra*, wherein the Court stated in a footnote:

> "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon his arrest. In that situation, the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." (49 L.E.D. at p. 98).

This exception is consistent with the doctrine contained in *Harris v. New York*, 401 U.S. 222 (1971), wherein the Court held that a defendant's credibility may be impeached through the use of an otherwise inadmissible confession. In the instant matter, however, the defendant never testified before the Government introduced the silence testimony in its direct case, nor did defense counsel in his cross-examination elicit any exculpatory version of the event. Furthermore, the defense attorney's attempts to obtain from a previous witness an exculpatory statement made by the defendant was at a time and place prior to the arrest and before the F.B.I. agents had even arrived at the scene.

It is evident that in order for the *Doyle v. Ohio, supra*, exception to be applicable, it is first necessary to have the defendant present some testimony that he gave an exculpatory version at the time of his arrest.

The record is clear that the defendant introduced no testimony which would serve as a justification for introducing the inadmissible testimony of the F.B.I. agents.

The sole authority for the Court of Appeals ruling is the case of *United States v. Fairchild*, 505 F. 2d 1378 (5th Cir. 1975) wherein the defense attorney cross-examined an F.B.I. agent as follows:

> "During the period of time that this investigation has been going on, to your knowledge has Mr. Fairchild cooperated fully with the F.B.I. and the U.S. Attorney's Office in responding with anything that you all wanted?" (505 F. 2d at p. 1383).

Although the *Fairchild* opinion does not relate the answer, it implies that the agent was forced to admit that the defendant had cooperated. It is apparent that defense counsel's question opened Pandora's Box; and therefore, the Court concluded that the defendant had introduced evidence that the Government was entitled to rebut.

In the instant matter, however, the defense was not successful in obtaining any evidence from Mr. Cristofero that an exculpatory statement was made by the defendant prior to the arrival of the F.B.I. More importantly, the defense attorney never even attempted to elicit from the witness what the defendant had stated to the F.B.I. at the time of his arrest and following his *Miranda* warnings.

C. ***The harmless error rule would not apply to the instant matter.***

Although the Court of Appeals did not discuss the question of harmless error, it is evident that the error that occurred was not harmless. The Government in its brief on appeal asserts that the major issue on all accounts in the indictment was "credibility." (Government's brief, pp. 4, 6, 7). The Government also stated in its brief on appeal that:

> "The use by the prosecution of the defendant's silence after the *Miranda* warnings were given for purposes of impeaching the defendant's credibility regarding the false exculpatory statement . . . " (Government's brief, p. 13).

It is clear that since "credibility" was the major issue on all counts of the indictment, the inadmissible testimony was presented for the express purpose of affecting all counts of the indictment, and it is evident that it accomplished its intended purpose.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: June 6, 1977

Respectfully submitted,

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Counsel for Petitioner

BEST COPY AVAILABLE

United States District Court for

DEFENDANT: WALTER R. CONLIN — WESTERN DISTRICT OF NEW YORK

DOCKET NO. Cr-1974-265

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (4/74)

In the presence of the attorney for the government the defendant appeared in person on this date

U.S. DISTRICT COURT W.D. OF N.Y.

MONTH	DAY	YEAR
May	10,	1976

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL David Levy (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [x] NOT GUILTY

JUDGMENT OF CONVICTION

FINDING & JUDGMENT

There being a ~~[redacted]~~ verdict of { [ ] NOT GUILTY. Defendant is discharged / [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of **did wilfully & knowingly aid & assist in the preparation of the U.S. Individual Income Tax Returns, which were fraudulent & false as to material matters, (Cts. 1,4,5,8,9,11,12,13) in vio. of Sec. 7206(2) Title 26, U.S.C. Unlawfully & wilfully, did remove mutilate & destroy records & documents of the U.S. from the Small Business Administration, an agency of the U.S., a public office wherein the said records & documents were filed & deposited (Ct. 14) in vio of Sec. 2071(a), Title 18, U.S.C.; knowingly submitting to the Small Business Administration with an application for disaster loan a document containing a false and fraudulent statement, (ct. 15) in vio. Sec. 1001, Title 18, U.S.C.**

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is [redacted]

sentenced as follows: The Court: On each of Counts 1,4,5,8,9,21,12,13/16, 15, I impose a sentence of Two (2) Years concurrent. I suspend the execution of the sentence and place the defendant on probation for a period of two (2) years concurrent. In addition on Counts 1,4,5,8, and 15 I impose a find of $1,000.00 on each count. The fine is to be paid.

Defendant found not guilty on counts 2,3,6,7,10,

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[x] U.S. District Judge

[ ] U.S. Magistrate

HAROLD P. BURKE, U. S. District Judge

Date May 10, 1976

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 648 — September Term, 1976.
(Argued January 10, 1977 Decided March 17, 1977.)
Docket No. 76-1346

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER R. CONLIN,
Defendant-Appellant.

Before:

MANSFIELD and VAN GRAAFEILAND, *Circuit Judges,*
and OWEN, *District Judge.**

Appeal from a conviction on eight counts of willfully preparing false and fraudulent income tax returns (26 U.S.C. §7206(2)); one count of destroying government records (18 U.S.C. §2071(a)); and one count of submitting a loan application containing false information to the Small Business Administration (18 U.S.C. §1001), following a trial in the United States District Court for the Western District of New York before Burke, *J.*, and a jury.

Affirmed.

---

*Of the Southern District of New York, sitting by designation.

MICHAEL R. WOLFORD, Rochester, N.Y. (Nixon, Hargrave, Devans & Doyle, Rochester, N.Y., of counsel), *for Defendant-Appellant.*

EUGENE WELCH, Rochester, N.Y. (Richard J. Arcara, U.S. Attorney for the Western District of New York; Gerald J. Houlihan, Assistant U.S. Attorney, of counsel), *for Plaintiff-Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

Following a jury trial in the United States District Court for the Western District of New York, Walter R. Conlin was convicted on eight counts of willfully preparing false and fraudulent Federal income tax returns in violation of 26 U.S.C. §7206(2). He was also convicted of destroying tax returns filed with the Small Business Administration (18 U.S.C. §2071(a)) and of submitting to the SBA a copy of an income tax return which contained false and fraudulent statements. (18 U.S.C. §1001). We affirm appellant's convictions on all counts.

Appellant is a licensed public accountant and the sole proprietor of the Southern Tier Accounting and Tax Bureau in Corning, New York. Between 1972 and 1974, he assisted various clients in the preparation of their Federal income tax returns. The information for these returns was secured from worksheets prepared by the clients, personal interviews and returns from previous years. The Government's proof relative to §7206(2) consisted largely of the testimony of appellant's clients that they had submitted accurate information to him and that this had not been incorporated in the returns; that false deductions had been claimed and legitimate deductions padded. Although Conlin gave detailed explanations for the discrepancies, he was convicted on eight of the thirteen counts with which he was charged.

Challenging the sufficiency of the evidence to support his conviction, appellant contends that the Government's proof disclosed only "errors made by an overworked and understaffed taxpreparer". This argument is completely without merit. The trial judge instructed the jury that appellant could not be convicted unless he acted "with criminal or evil intent" and that his conduct was not willful if he acted with "negligence or carelessness, or mistake, or innocently, or even with gross negligence or gross carelessness. . . ." This charge comported with the willfulness standard prescribed in *United States* v. *Pomponio*, 45 U.S.L.W. 3277, 3278 (U.S. October 12, 1976) and adequately informed the jury of the quality of evidence needed to convict. Such evidence was present in abundant quantity. That appellant was more than simply careless is indicated by both the frequency and similarity of his misstatements. *See United States* v. *Herskovitz*, 206 F.2d 881, 884 (2d Cir. 1954); *United States* v. *McKee*, 456 F.2d 1049, 1050 (6th Cir.), *cert. denied*, 407 U.S. 910 (1972). The proof established a pattern of overstated medical expenses, interest expenses and casualty losses, *see United States* v. *Tager*, 479 F.2d 120, 122 (10th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974), and unusually high service fees based on the excessive refunds which followed. It was sufficient to support appellant's conviction on all eight counts.

The charge of destroying government documents stems from an incident which took place on January 18, 1974 at the Elmira office of the SBA. In the aftermath of Hurricane Agnes, Conlin assisted many of his clients in obtaining disaster relief loans from the SBA; and, for this purpose, he accompanied one Thomas Gill to a meeting in Elmira with SBA official James Cristofero. Cristofero testified that he showed Conlin and Gill copies of Gill's income tax returns which had been submitted to the SBA on January 4, 1974 in support of Gill's application for a disaster relief loan and requested assurance that the originals had been filed with the IRS. He then asked them to sign the

copies — Gill as the taxpayer and Conlin as the preparer. When both had signed, Cristofero gave Conlin a memorandum stating that the SBA would be verifying the information on the returns with the IRS, whereupon Conlin grabbed the signed copies and put them in his briefcase. He ignored Cristofero's demand for their return, and, despite a warning that he was destroying government property, began to tear them up and stuff the pieces in his clothing.

At this point, two FBI agents, summoned by Cristofero, arrived and witnessed Conlin destroying the documents. When they asked Conlin what he was doing, he did not respond. He was then arrested and given appropriate *Miranda* warnings. FBI Agent Bucher testified that, about an hour later, Conlin, suddenly and without solicitation, broke his silence. He told Bucher that the documents he had destroyed were not submitted to the SBA on January 4 but that he had brought them with him that same day. When the torn pieces were recovered and pieced together, it was discovered that they overstated the amount of Mr. Gill's disaster loss by more than $100,000.

Relying upon *Doyle* v. *Ohio*, 44 U.S.L.W. 4902 (U.S. June 17, 1976), Conlin contends that the Government erred in introducing testimony concerning his silence. We disagree. The first mention of Conlin's silence came during the Government's direct examination of Mr. Cristofero, when he was recounting the events surrounding Conlin's seizure of the tax returns. He testified that he asked Conlin what he was doing, told him that destroying government documents was a crime, and that Conlin said nothing. Cristofero further testified that he then called Mr. McDevitt, another SBA official, into his office. When asked whether Conlin said anything to Mr. McDevitt, Cristofero replied, "[H]e may have said something, but nothing that I can recall." During the cross-examination of Mr. Cristofero, Conlin's counsel went squarely to the issue of what was said by Conlin to the witness or to the FBI, seeking an admission that Conlin had from the outset told Cristofero that he had brought

the documents with him to the office that day and that he intended merely to leave with what he had brought. This was the version later testified to by Conlin himself.

When it became apparent that Conlin was adopting the position that he had spoken throughout the episode and had told both SBA and FBI officials that he had brought the documents with him on January 18, the U.S. Attorney brought out what he understood to be the facts. FBI Agent Rudy testified that, when he and his partner, Agent Bucher, arrived at the SBA offices, they asked Conlin what he was doing and he did not respond. Rudy testified that Conlin was then arrested, given his *Miranda* rights, and continued to remain silent. Bucher corroborated Rudy's testimony concerning Conlin's silence but stated that, about an hour after his arrest, Conlin voluntarily broke his silence and offered his exculpatory version of the events.

Appellant's contentions concerning the making of exculpatory statements raised an issue which the Government was entitled to meet. It was Conlin's counsel who propounded the theory that Conlin had spoken throughout the incident and had maintained from the outset that he had brought the items with him that day. "Having thus raised the question . . ., [appellant] opened the door to a full and not just selective development of that subject." *United States* v. *Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975). The better course for the trial judge would have been to caution the jury that the evidence of Conlin's silence after receiving his *Miranda* warnings was being received solely to rebut Conlin's version of the incident, and to instruct that a defendant's decision to remain silent, in reliance on his constitutional rights, is not in itself indicative of guilt and could not be considered for that purpose. However, the admission of this evidence under the circumstances here did not deprive Conlin of a fair trial.

Appellant was also convicted of making false representations to the SBA in connection with his own application for a disaster relief loan. The Government's proof showed that in January 1973 appellant submitted a loan application, attached to which was a copy of an income tax return dated April 2, 1972. This return substantially overstated the amount of appellant's estimated tax payments. Moreover, the original had not been filed with the IRS. In fact, Conlin did not file a 1972 return until October 1975. The evidence, viewed in the light most favorable to the Government, *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), was more than ample to support the jury's finding of guilty on this count.

Appellant advances several other arguments for reversal, only two of which merit comment. The last witness called by the Government was an IRS agent who had prepared a chart summarizing the testimony of Conlin's taxpayer clients. This is a common procedure whose use we have repeatedly approved. *See, e.g., United States* v. *Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972). Defense counsel was given ample opportunity to examine the chart prior to its being received in evidence. His only objections to it were based on its failure to be keyed to the exhibits, its alleged inclusion of a number of evidentiary items outside the indictment and his dissatisfaction with the heading of a column entitled "Adjustment", which the attorney thought should have been entitled "Correct Amount". These objections were properly overruled. Copies of the exhibit were then distributed to the jury to assist them in following the testimony of the witness.

The court subsequently discovered during the cross-examination of the witness that a column in the exhibit entitled "Amount Per Evidence" was actually the amount that the IRS agent concluded would have been allowed in a civil audit of each of the thirteen returns. These amounts were, in almost every case, either substantial reductions from the amounts claimed, or

a complete disallowance. Although the Judge had not permitted the witness to testify on this point, he refused to strike the exhibit which the jury had been examining during the testimony and which he felt did contain much pertinent information. Instead, he instructed the jury that:

> . . . that chart has no independent existence or evidentiary value in and of itself. The evidentiary value which is to be given that chart is entirely dependent upon the basic testimonial or documentary proof upon which it is based, and upon the accuracy and credibility of the testimonial or documentary proof upon which the chart is based. It is to have no further function in this case.

As was stated in *Gordon* v. *United States*, 438 F.2d 858, 876 (5th Cir. 1971), *cert. denied*, 404 U.S. 828 (1971),

> . . . when summaries are used . . . the court must ascertain with certainty that they are based upon and represent competent evidence already before the jury. . . .

This, unfortunately, was not done, either upon the offer of the exhibit, or upon thereafter learning that portions were not supported by the record. In fact, the court left it up to the jury to determine what parts of the exhibit were supported and what were not.[1]

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[1]The court charged in this respect as follows:

> The government introduced in evidence a chart — they call it a Summary Chart — in connection with the testimony of the expert from the Internal Revenue Service. That chart and the testimony of this expert had previously been discussed in chambers between myself and counsel for the government and counsel for the defendant. It was my understanding that the testimony of this expert witness from the Internal Revenue Service was to assemble the evidence regarding various items in dispute and was to present a chart which would show in graphic form, and would assemble in a

(footnote continued on following page)

A chart submitted by the prosecution is a very persuasive and powerful tool and must be fairly used, since, by its arrangement and use, it is an argument to the jury during the course of the trial. Here, the inadmissible portions were arguably quite damaging. A chart which for any reason presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error. *Steele* v. *United States*, 222 F.2d 628, 630 (5th Cir. 1955), *cert. denied*, 355 U.S. 828 (1957); *see also*, *Holland* v. *United States*, 348 U.S. 121, 127-28 (1954). We conclude, however, from a study of the entire record that in the circumstances of this case this error did not deprive appellant of a fair trial. Not only was the proof of appellant's guilt overwhelming, but of even more significance is the fact that the jury acquitted on five of the thirteen items with which the chart dealt. Given this, it would appear that the jury did not unduly rely upon this exhibit to the appellant's prejudice.

Appellant also urges reversible error because of the failure of the District Judge to comply with the requirements of Rule 30, F.R. Crim. P. This rule provides that the parties may submit proposed jury instructions to the trial judge and that the trial judge shall inform counsel of its proposed action on the requests prior to their arguments to the jury. It also requires that, on request, counsel shall be given opportunity to make objection to the charge out of the presence of the jury. Although appellant's

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(footnote continued from preceding page)

> paper the evidence which had been given about the disputed items throughout the course of this trial. It turned out on the testimony of this expert that he did not understand that that was to be his function at all. His understanding was, and the way the chart was prepared, was that he was to give his expert opinion about the deductibility of the disputed items rather than to assemble the evidence about the disputed items. The chart was then in evidence. I declined to strike the chart from evidence because some of the testimony regarding the chart was clearly admissible in evidence.

counsel submitted proposed instructions, the Court did not disclose its rulings prior to the summations. Appellant at no time objected to this procedure. Although District Judges should comply with the provisions of Rule 30, their failure to do so does not *ipso facto* mandate reversal, *Hamling* v. *United States*, 418 U.S. 87, 135 (1974). Appellant's failure to object to the trial court's omission and his inability to demonstrate any prejudice resulting therefrom satisfy us that the error was harmless. *See United States* v. *Pommerening*, 500 F.2d 92, 101 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *United States* v. *Nalley*, 455 F.2d 259, 262-63 (6th Cir. 1972).

Appellant did not request the opportunity to voice his objections to the charge in the absence of the jury as required by Rule 30 and cannot now contend for the first time that this procedure should have been followed. Appellant's objections referred simply to numbered requests. Apparently he was satisfied to refer to the numbers in the jury's presence. In any event, no prejudice to appellant resulted from such reference.

Our review of the record satisfies us that appellant's numerous other assertions of errors are not meritorious. Accordingly, the judgment of conviction is affirmed.

ORDERS DENYING REHEARING

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD

HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

HON. RICHARD OWEN
District Judge

United States of America,

Plaintiff-Appellee,

v.

Walter R. Conlin,

Defendand-Appellant.

76-1346

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Walter R. Conlin,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

Walter R. Conlin,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant Walter R. Conlin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

DIRECT EXAMINATION OF JAMES J. CRISTOFARO

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[57]*
came to the office, is that right?

A Yes, it is.

Q What did you do with that letter after they had signed the tax returns and had given them back to you and you put them on the desk? What next happened?

A I handed the letter to Mr. Gill, and asked him to read it, and that if they had any questions to please ask them, and Mr. Gill read the letter, and I believe Mr. Conlin read the letter. And at that point I started talking to Mr. Gill again about the use of proceeds and the loan request itself, and Mr. Conlin picked up the copies of the tax returns from my desk and stuffed them into his briefcase.

MR. HOULIHAN: Your Honor, may I read this one paragraph, and this is a letter dated January 18, 1974, well within the date.

THE COURT: All right.

MR. HOULIHAN: And the third paragraph of that letter says: "It may be necessary to verify the accuracy of the figures on the tax returns; therefore, the SBA would like to have written

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permission from you to verify the accuracy of your tax returns with the Internal Revenue Service. It would be helpful if you requested stamped copies from the IRS and deliver them to us."

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*[ ] indicates page numbers of original testimony.

Is that an accurate reading of that paragraph?

A Yes.

Q It was after Mr. Conlin read that that he took the returns from your desk, is that correct?

A Yes.

Q He put them in his briefcase, is that right?

A Yes, he did.

Q And what, if anything, occurred after that?

A I saw him do this, and I told Mr. Conlin that the copies were, in fact, a part of our file; therefore, not removable except by authorized employees or upon written request from an applicant.

Q And what, if anything, did he say at that time?

A He didn't say anything. And I asked him to return the copies. He said, "No. I will get the originals for you."

I said, "Well, I don't need the originals. All I need are the copies."

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And he just left them in the briefcase.

Q Did you again ask him to give them back to you?

A I asked him several times to return them to us.

THE COURT: You mean at that particular instance or later?

A At that particular instance. I also turned to Mr. Gill and said, "Mr. Gill, these are supposed to be copies of your tax returns. Will you please advise your representative to give them back to us?"

Mr. Gill was just standing there somewhat dumbfounded. He didn't say anything, nor did he do anything. So I advised Mr.

Conlin that taking these things as he did might constitute an unlawful offense.

Q What did he say to that?

A He didn't say anything.

Q Was there any conversation between you and Mr. Conlin and Mr. Gill subsequent to that which you have already told us?

A No. Will you state the question again?

Q All right. You apparently asked him two or three times to give you back the returns, and he said, "No." Was there any other conversation at that time that you can recall?

A No.

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Q And did there come a time that you asked someone else to come into the office?

A Yes. I asked Mr. Garrity to come in and advised Mr. Garrity that Mr. Conlin had removed the copies from the file, and then Mr. Garrity asked him to please return the copies, that they were not his property at that time.

Q And what did Mr. Conlin say?

A Mr. Conlin didn't say anything, to my knowledge. He just stood there.

Q And he was standing up? Was Mr. Gill standing up?

A I believe at that time they were both standing up.

Q And was Mr. Conlin doing anything at that time?

A Well, I advised Mr. Conlin that I would call the FBI if he did not return them. So I did pick up the phone and started to call the FBI, and at that point Mr. Conlin began to rip the documents—

THE COURT: To what?

A To rip and tear up the documents in his briefcase.

Q You were standing there watching him doing this, is that right?

A Yes, I was.

Q When you told him that you were going to call the FBI, did he say anything?

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A He just stood there.

Q He didn't say anything to you?

A Not that I can recall.

THE COURT: We will take a short recess.

(Recess from 3:35 P.M. to 3:50 P.M.)

DIRECT EXAMINATION CONTINUED

BY MR. HOULIHAN:

Q Mr. Cristofaro, just before the recess you mentioned that you had called the FBI?

A Yes.

Q You made that call personally, is that right?

A Yes, I did.

Q Who did you get?

A I asked for Mr. Bucher or Mr. Rudy. I don't know who I talked to.

Q And did you explain to them what was happening?

A Yes.

Q What did you ask him to do?

A They indicated to me that they would come right over.

Q Now after the telephone call to the FBI —

THE COURT: You were talking to

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somebody in the FBI right in Corning?

A In Elmira.

THE COURT: In Elmira?

A Yes.

THE COURT: All right.

Q Did Mr. Conlin say anything to you during this period of time?

A After I called the FBI, Mr. Conlin asked if he could call his lawyer. I said, "Yes."

Q And did he?

A He tried to. He was unable to reach him.

Q Where were the tax returns during this period of time?

A After I called the FBI, Mr. Conlin was apparently in the process of tearing them up. I also told him that not only had he removed property that was in possession of our agency, but he was also destroying them, and this could constitute unlawful action.

Q And did he say anything to you in response to that?

A No. At that point he seemed to be in a hurry to leave.

Q And was he standing up throughout this period of time?

A Yes.

Q And what was Mr. Gill doing at this time?

A Mr. Gill was just standing there and not saying anything.

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Q Mr. Gill didn't say anything at all?

A No.

Q Did there come a time that Mr. Conlin wrote something to you?

A Yes. Mr. Conlin wrote on a piece of paper, something to the effect of, "I hereby withdraw the application," and asked Mr. Gill to sign it, which Mr. Gill did, and threw that on my desk.

MR. HOULIHAN: Would you mark this for identification?

(Government's Exhibit 3 marked for identification.)

Q Are you familiar with Government's Exhibit 3 marked for identification?

A I'm not familiar with this. I don't recall it.

Q You don't recall this one?

A No, I don't.

THE COURT: Just a moment. You said you spoke about a withdrawal, which you said they signed and threw on your desk. That is not the one?

A No. Mr. Gill signed a little sentence which Mr. Conlin had written.

CROSS-EXAMINATION OF JAMES J. CRISTOFARO

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A Not positively, no. We had a copier.

Q. And was it capable of copying two sides of a page?

A. I don't think so.

Q It was only capable of copying on one side?

A I think so.

Q Now in regard to this meeting in your office, you said at one point you noticed that Mr. Conlin was tearing some paper, is that correct?

A Yes.

Q Was he standing or sitting when you noticed that?

A I believe he was standing.

Q Now did he have his coat on?

A I am not positive.

Q Did he have his hat on?

A I am not positive.

Q Where was Mr. Gill when you saw this? Where was he in the room?

A He was to my right.

Q And how far was Mr. Gill from Mr. Conlin?

A Two or three feet.

Q Right next to him?

A Yes.

Q When was it in time that you noticed that Mr. Conlin was

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ripping or tearing some papers?

A I don't know the exact time, but it was sometime around twelve o'clock, I suppose.

Q And that was about a half hour after they had been in there?

A Yes.

Q And how long was it, after the FBI was called, or before?

A It was after.

Q And about what time did the FBI arrive?

A About ten minutes later.

Q And that would be about twelve ten?

A Somewhere around there.

Q Were you familiar with the FBI phone number at that time?

A No.

Q Did you look it up before you called?

A Yes.

Q Did you know where their office was before you called?

A Yes, I knew they were in the Post Office Building.

Q Had you had anything to do with the FBI before you called?

A In what respect?

A Any business with them or anything?

A I had met both of them before. I don't know if I had any specific business.

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Q Were these agents regularly stationed in Elmira?

A I think so.

Q And they lived in the Elmira vicinity?

A I guess they do.

Q You told Mr. Conlin that he couldn't take those papers with him, is that correct?

A Yes.

Q And you told us Mr. Conlin didn't say anything in return, is that right?

A I can't remember him saying anything other than the fact he did say, "I will bring you the originals."

Q But he never argued with you, or he never said anything back when you said, "You can't take them"?

A We had a short discussion, but I can't remember what was said.

Q Didn't he argue with you and say to you, "I came in with these papers, and I can take them out with me"?

A He might have said that.

Q Do you remember him saying that more than once?

A I don't remember him saying it.

Q Do you remember him arguing with you and not just sitting back and having you talk, as a one-sided conversation?

A I can't remember what he said, if anything.

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Q You told us yesterday that every time you said something to him that he just stood there and didn't say anything and didn't reply to you?

A I kept asking him to return the papers to me.

Q Didn't he argue with you and say, "These are my papers. I came in with them, and I can go out with them"?

A I don't recall him saying that. He did say he would get the originals.

Q In your presence, after the FBI got there, the FBI called Mr. Larimer, Assistant United States Attorney in Rochester?

A I think he did, yes.

Q At that point Mr. Conlin was put on the phone to talk to him, was he not?

A I think so, yes.

Q And did he tell that gentleman, in your hearing, "These are my papers. I came in with them, and I'm going to take them out with me"?

A I don't recall what he said.

Q Did he say he brought them there that day, January 18, 1974?

A I don't recall.

Q To your knowledge, at that same time was he permitted to call an attorney?

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A Yes. He attempted during the whole course of events to make two calls.

Q Did he talk to an attorney by the name of Mr. Walsh or Mr. Welch from Corning?

A I can't remember whether or not he was able to reach Mr. Walsh.

Q Do you recollect him telling Mr. Walsh, "I came in with these papers, and I think I have a right to take them out"?

A No, I don't.

Q Did you understand why he was arguing with you for not returning them to you?

A The fact is that he did not have the papers when he came in with them. I had them.

Q But didn't he say that he brought them in?

A He might have said that.

Q Do you know whether or not he had any income tax papers with him when he came to your desk?

A No, I don't know if he did or not.

Q Do you know whether or not he had any papers of any returns with him when he came to your desk, in his briefcase?

A I don't know.

MR. HOULIHAN: Objection, Your

DIRECT EXAMINATION OF FBI AGENT RICHARD RUDY

Pages 495-505

DIRECT EXAMINATION OF FBI AGENT ROBERT BUCHER

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A Yes. I am no accountant, but I do know there is a difference.

MR. LEVY: That is all. I have no further questions.

MR. HOULIHAN: I have no further questions.

(Witness excused.)

THE COURT: We will take a recess.

(Recess from 11:45 A.M. to 12:00 P.M.)

RICHARD W. RUDY, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOULIHAN:

Q Mr. Rudy, by whom are you employed?

A The Federal Bureau of Investigation.

Q How long have you worked for the FBI?

A Almost twenty-three years.

MR. LEVY: As I understand it, this gentleman has been sitting in the courtroom for some time.

Q Have you been seated in the courtroom?

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A No, sir.

MR. LEVY: All right, my mistake.

Q How long have you worked for the FBI?

A Almost twenty-three years.

Q Where is your duty station?

A Elmira, New York.

Q I call your attention to the date of January 18, 1974. Were you in Elmira on that date?

A Yes, sir.

Q And did there come a time on that date that you received a call from someone at the Small Business Administration office?

A Yes, sir.

Q Would you please tell the ladies and gentlemen of the jury what transpired in that telephone conversation?

A It was approximately noontime on that date, and I was seated at my desk. I received a phone call from James Cristofaro, a Loan Officer at the Small Business Administration in Elmira, New York, and he informed me that he had one Walter Conlin in his office at that time.

MR. LEVY: Wait a minute. I object to what he informed him.

THE COURT: I sustain the objection. It is sufficient that he got the

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call.

Q What, if anything, did you do in response to that telephone call?

A I went to the Small Business Administration office.

Q Were you alone at the time?

A No. My partner went with me.

Q Who was your partner?

A My partner is Robert Bucher.

Q And what, if anything, did you do when you arrived at the Small Business Administration office?

A After a discussion with Mr. Cristofaro, who explained the circumstances of what was going on at the time, I went and spoke with Mr. Conlin.

Q About how long a period of time passed between the time you received the telephone call and the time you arrived at the office?

A Approximately ten to fifteen minutes.

Q Did you then speak with Mr. Conlin?

A Yes, I did, sir.

Q What did you tell him at that time?

A I told Mr. Conlin that I had been called to the SBA because there had been an allegation made that he had taken government papers, or property, and that he was destroying
[498]
this property, and I wished to discuss this matter with him.

Q And what was Mr. Conlin doing at this time?

A When I got to the SBA office, he was just kind of roaming around the room.

Q And did he have anything in his hands?

A Not that I recall at the time, sir.

Q And at the time that you spoke with him, was he standing there, or was he seated?

A No. We were both standing, and I said, as I explained my reason for being there, I said that prior to talking to him, I would like him to read a statement of his rights. I produced this statement, and he read the same.

MR. HOULIHAN: Would you mark these for identification?

(Government's Exhibits 47, 48, 49 and 50 marked for identification.)

Q I show you Government's Exhibit 47 marked for identification, and can you tell me what that is?

A Yes. This is the statement of rights that I showed to Mr. Conlin, which he read.

Q And did he sign that?

A No, he did not, sir.

Q Did you ask Mr. Conlin to sign that?

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A Yes, I did, sir.

Q What, if anything, did you say?

MR. LEVY: I object.

THE COURT: Objection is overruled.

A He declined and said he wanted to talk to his lawyer.

Q Was he allowed to call his lawyer?

A Yes, he was.

Q Did you read what purports to be a statement of his Constitutional rights?

A No, I did not read it to him, no, sir. He read it himself.

THE COURT: He did read it?

A Yes, sir.

THE COURT: You saw him read it?

A Yes, sir.

Q I show you Government's Exhibit 49 marked for identification. Can you tell me what that is?

A Yes. This is a log showing the attempted interview with Mr. Conlin by myself.

Q And did you interview Mr. Conlin?

A I made an attempt to. I did not because he would not respond to my questions.

Q And what was the time of the interview, the time that the interview began and the time that it terminated?

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A The interview began at 12:14 P.M., at which time I gave him the statement of his rights. He returned this statement to me at 12:16, at which time he said that he refused to sign it.

Q Subsequent to the time that Mr. Conlin declined to sign the statement and refused an interview with you, what transpired?

A Well, I made an effort to contact the then Assistant United States Attorney, David Larimer, for an opinion on this matter as to what we should do—

THE COURT: He was in Rochester, and you telephoned him?

A Yes, sir, I telephoned him, sir.

Q And what was Mr. Conlin doing during this period of time?

A At this time he was just walking around the room with these other SBA employees and my partner, talking to him, milling around the office.

Q Was Mr. Conlin talking with you within hearing distance?

A No, sir, I was not within hearing distance of Mr. Conlin.

Q Did there come a time that Mr. Conlin was placed under arrest?

A Yes.

Q I show you Government's Exhibit 48 marked for identifica-
[501]
tion. Can you tell me what that is?

A Yes. This is what we referred to as an Arrest Log, and it shows the occurrences that took place from the time we arrested him until, in this case, he was released by the U.S. Magistrate.

Q What time was Mr. Conlin placed under arrest?

A 12:49 P.M.

Q And what, if anything, did you say to him at that time?

A I just told him that he was arrested for theft of government property.

Q Did there come a time that Mr. Conlin was searched?

A Yes, sir.

Q And when was that?

A Just within minutes after the arrest, my partner and I took him to a private room in another part of the building.

Q And what, if anything, did you do when you got to the private room?

A We asked him to remove his clothing, which he did, and we searched his clothing, and we found papers in various parts of his clothing and body.

Q Were the papers in his pockets?

A Yes, sir. These papers, which were all torn up, or at

[502]
least appeared to be torn, were in his trouser pockets, in his suit coat pockets, his overcoat pockets and secreted beneath his shirt and undershirt, and he also had some in his hand.

Q Did you collect these papers?

A The ones we found on him at that time, yes, we collected those, and I became custodian of those papers, and then I subsequently got another pile of papers from Mr. Garrity of the SBA.

Q Do you know where Mr. Garrity got those papers?

A He said he had picked these up —

MR. LEVY: I object to what he said.

THE COURT: Objection is overruled.

THE WITNESS: He said he picked these up from the floor where Mr. Conlin had dropped them.

Q Did you take a picture of those papers?

A Yes. Subsequently, I took all of these papers, and I made four separate piles, and I identified each pile as to where these particular papers came from, and then I took two Polaroid photographs of those four piles.

Q I show you Government's Exhibit 50, which consist of

[503]
two photographs, and they appear to be identical, are they?

A These are two separate Polaroid photos of the same stacks of paper, right.

Q And these were taken by you?

A By myself.

Q Do these reasonably show the papers as they existed at the time?

A Yes.

MR. HOULIHAN: I offer G-50.

MR. LEVY: No objection.

THE COURT: Received.

(Government's Exhibit 50 marked in evidence.)

Q Calling your attention to Government's Exhibit 50 marked in evidence, there appears to be four different piles of paper here. And Pile No. 1, can you tell me why that is identified as "Pile No. 1"?

A I don't recall which pile is which, but I identified each pile as the location from which it came from. One pile came from his hand; one pile came from Mr. Garrity, that he had collected, and one pile were the papers taken from beneath his dress shirt and his undershirt, and the other pile were the papers that had been taken from all of the
[504]
pockets of his clothing.

Q What, if anything, did you do with those papers when you finished collecting them and photographing them?

A I packaged those papers up, and I shipped them to our Laboratory and asked them to try to reconstruct just what these papers were.

Q And these were papers that were subsequently reconstructed by the FBI Laboratory, and they represent Government's Exhibit 10, 7, 8, 12, 13, 9, 6, 11 and 5, is that correct?

A Yes, sir.

Q Now subsequent to the time that you arrived at the Small Business Administration and you ultimately searched Mr. Conlin, at any time did he make any statements to you?

A No, not to me, sir.

Q And did he at any time request that he talk to his lawyer, that he be able to call his lawyer?

A Yes, sir, and he made several attempts to contact his lawyer — by phone, that is.

Q And at any time did Mr. Conlin speak to Mr. Larimer, the Assistant U.S. Attorney, that you called?

A Not that I recall.

Q And who was present during the search?

A Just myself and my partner and Mr. Conlin.

[505]

Q And subsequent to that search, did you take Mr. Conlin over to your office in Elmira?

A Yes, we did, sir.

Q And according to Government's Exhibit 48, this was at 1:08?

A Yes, at 1:08, we transported Mr. Conlin to our office in Elmira.

Q And did you give him lunch at that time?

A He was offered lunch, but he declined.

Q And that is noted on your log, is that correct?

A Yes, sir. This was somewhat later in the day that he was offered lunch at 1:40 P.M.

Q Mr. Rudy, during the period of time that you were at the Small Business Administration office, did you see Mr. Conlin ripping anything?

A I saw his fingers moving, and then I saw small bits of paper falling to the floor.

MR. HOULIHAN: That is all the questions that I have.

CROSS EXAMINATION

BY MR. LEVY:

Q When you searched Mr. Conlin, did you search his briefcase?

A We looked into his briefcase.

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Q You didn't know how much you paid any one of the doctors, did you?

A No.

Q Your wife just put a total amount down as far as the doctors are concerned?

A Right.

Q When Mr. Conlin asked you about the doctors, did you tell him you would get the amounts for him?

A No.

Q You didn't have any bills in front of you, doctor bills, when you went to see him?

A I can't say for sure what I did have.

MR. LEVY: No further questions.

MR. HOULIHAN: I have no further questions.

(Witness excused.)

ROBERT W. BUCHER, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOULIHAN:

Q Mr. Bucher, by whom are you employed?

A The Federal Bureau of Investigation.

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Q And where are you employed?

A I am stationed at Elmira, New York.

Q And how long have you been with the FBI?

A Twenty-four years.

Q I call your attention to the date of January 18th, 1974. Were you stationed in Elmira at that time?

A I was.

Q And at that time did you go to the Small Business Administration office in Elmira with Special Agent Rudy?

A Yes, I did, sir.

Q And is Mr. Rudy your partner?

A Yes, he is, sir.

Q And just the two of you are stationed down in Elmira?

A Yes, sir.

Q Would you tell the members of the jury approximately what time you arrived at the Small Business Administration office?

A It was shortly after noon, like twelve ten, twelve fifteen, something like that.

Q Did you see Mr. Conlin there at that time?

A Yes, I did, sir.

Q What was he doing at that time?

A He was standing by one of the desks in the Administrative [585]
Office.

Q And was this in a private office of one of the individuals or a main office?

A It was in the open area of the main office.

Q And what was he doing at that time, if anything?

A He was just standing there at that time.

Q And did you have a conversation with him at that time?

A Yes, sir.

Q What was that?

A I asked Mr. Conlin what was going on, and I asked him where were the papers that he had allegedly taken from the file that we had been told about.

Q And what did he say to you?

A He did not answer me.

Q Did you say anything else to him?

A Not at that time, no, sir.

Q How long were you there at this Small Business Administration office?

A (No response.)

Q I show you Government's Exhibits 48, 49 and 47 marked for identification, which have been previously identified by Mr. Rudy, and perhaps one of those might refresh your recollection. [586]

(Government's Exhibits 47, 48 and 49 handed to the witness.)

A We were there about forty-five or fifty minutes.

Q And during that period of time, you say when you first arrived Mr. Conlin was standing up in the main office?

A Yes.

Q Did there come a time that Mr. Conlin sat down?

A No, sir. Mr. Conlin, when he declined to answer me as to when I asked what was he doing, and he should give back any papers that he might have taken, my partner got on the telephone and I stayed with Mr. Conlin. By that, I mean I stayed physically with him, within a foot or two of him, and kept my eye on him until the matter was resolved, and Mr. Conlin walked about the open part of the office for the next fifteen, twenty minutes or so, and I do recall telling him at one point to stay still, you know.

Q Was he doing anything while he was walking around the office?

A Yes, sir.

Q What was he doing?

A He was carrying a briefcase, and he held the briefcase in his left hand in front of him, and he was putting his right hand in his pocket, pulling something out of his

[587]
pocket, and making motions as if he was stuffing material inside his dress shirt, but the briefcase blocked that part, but, of course, I could see all this hand movement and arm movement.

Q And about how long did this go on?

A Twenty minutes, possibly.

Q And then you asked him to sit down?

A I don't recall asking him to sit down, sir.

Q Did he ultimately sit down?

A I don't remember him sitting down.

Q Did you have him stand in one spot?

A I did ask him to stop, you know, running around the whole office, yes, sir.

Q Did he say anything to you during the period of time that you were at the Small Business Administration office?

A I don't recall him saying anything to me.

Q Did he attempt to call his lawyer?

A I believe he did make a telephone call for that purpose. I don't think it was completed, as I remember it.

Q Did there come a time that you left the Small Business Administration office?

A Yes, sir, after he was placed under arrest.

Q Now Government's Exhibit 48 is the log of the arrest, is
[588]
that right?

A Yes, sir.

Q And that is signed by you as well as Special Agent Rudy?

A Yes, sir.

Q About what time did you place Mr. Conlin under arrest?

A At 12:49 p.m., January 18th.

Q You arrived there approximately 12:10?

A Yes.

Q And at 12:49 he was placed under arrest?

A Yes, sir.

Q Did he say anything to you, give any explanations at all during that period of time?

A No, sir.

Q What, if anything, did you do after Mr. Conlin was placed under arrest?

A After he was placed under arrest, we notified him that we were going to search his person incidental to arrest and because of the observations I had made of what he was doing during the period immediately prior to arrest. We secured a private room at the building and took Mr. Conlin there and searched his person.

Q And was this a forcible search, or did he voluntarily take his clothes off?

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A There was no force involved, although Mr. Conlin did not make any statements to us. He did what he was instructed. He didn't fight us in any way.

Q There were some papers then taken, is that correct?

A We found papers in Mr. Conlin's coat pocket, and inside his shirt, and he had removed his tie and his coat and his dress shirt and his trousers, and when he removed his trousers, and when he removed his dress shirt, a number of torn pieces of paper did fall on the floor and were recovered by myself and Mr. Rudy.

Q Were you present when the photographs, Government's Exhibit 50 in evidence, were taken?

A Yes. I remember that being taken in our office.

Q And those were the papers that had been taken from Mr. Conlin, that fell to the floor?

A It appears to be the photograph.

Q You didn't take this one?

A No, but I was there when Mr. Rudy took a picture of the piles of paper.

Q Did there come a time that you ultimately left the Small Business Administration office with Mr. Conlin?

A Yes, sir, immediately after the search in that private room that I spoke of, and we went to my office, the Resident
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Agency office in Elmira, and as soon as we arrived there, I contacted the United States Magistrate for the purpose —

Q Is he located in Elmira?

A He is located in a building in close proximity to our office.

Q And how long were you at your office?

A A little over an hour, an hour and ten minutes, maybe.

Q And during that period of time, did you have any conversations with Mr. Conlin?

A Yes, sir.

Q Explain to us what they were?

A When we got to our office, and since Mr. Conlin had just been arrested, he was fingerprinted and photographed, and Mr. Rudy left to file the complaint at the United States Magistrate's office, and I felt it would be more comfortable for Mr. Conlin and I to merely wait in our office, which is directly across the

street from the Magistrate's office. So we remained there for about an hour after Mr. Rudy had gone and after he had been fingerprinted and photographed. Mr. Conlin had previously refused any comments, so I made no attempt to interview him. I remember I did make attempts to make small talk, so to speak. The two of us were in the office for an hour, and I didn't elicit much

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response from Mr. Conlin. He did ask to use the telephone again, and I believe he called his office in Corning from my office. Then I would say after we had been in the office forty, forty-five minutes, Mr. Conlin did volunteer some statements to me, which I noted down, and which I do recall.

Q What were these statements?

A We were sitting in the office, and I don't remember his exact phraseology, but I think he said, "The reason I tried to take those tax returns, or papers, is because a red-headed male employee of the SBA told me that I couldn't leave the office with them."

He also told me that the papers which he had torn and which we had found on his person were not previously given to the SBA, although he realized the SBA officials maintained that. And he told me that he had just given them to the SBA that morning and that they were copies of unfiled tax returns of his client, Thomas Gill.

He further told me that he and his client were being interviewed by a Mr. Cristofaro of the SBA and that after he had given these copies of unfiled tax returns of Mr. Gill, Mr. Cristofaro returned them asking that Mr. Gill sign and date them as the taxpayer and that Mr. Conlin

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sign and date them as the preparer, and they both did so. He gave the signed copies back to Mr. Cristofaro and were then given a letter by Mr. Cristofaro which stated, in part, that the SBA desired authenticated copies of Mr. Gill's tax returns for that year, tax returns which bore the official IRS stamp, showing that they were true copies. And he said that since these were not copies of returns that had ever been filed, that these were unfiled returns, that they could never be authenticated as being true copies, because he never filed them. So he felt he should take them back. He concluded by stating that had he been given this letter requesting authenticated copies marked to show they were true copies, he never would have given Mr. Cristofaro the copies he did give that day. And that is all I recall.

Q And this conversation took place about an hour and a half after you first made contact with Mr. Conlin?

A (No response.)

Q Is that right, you were forty-five minutes at the Small Business Administration office?

A Yes, about an hour and a half after we originally got to the SBA office, shortly after noon that day.

Q And it was forty-five minutes in the SBA office, and he
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never said anything to you?

A No, and I attempted to talk to him at that point, and he declined to answer me.

Q And then you were forty-five minutes in your own office, and you didn't attempt to interview him at that time, but forty-five minutes passed before he volunteered the statement that you just told us about, is that right?

A Yes, with the times being approximate.

Q At the time that you were at the Small Business Administration office with Mr. Conlin, did you ask him why he had taken the returns, or why he had taken the papers?

A No, sir.

Q Did you ask him why he was ripping up the papers?

A No, sir, because when I first saw Mr. Conlin, he was not ripping up papers. He was merely standing there. And when I went to him, after being told that he had possession of these papers, and we introduced ourselves and showed our identification that we were special agents of the FBI and I asked him to return any papers that he might have had, that he could not take these, and he didn't do this, and it was thirty minutes later, probably, before he was ultimately arrested, because we didn't want to arrest him. It seems a little silly that he wouldn't give us the

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papers, you know, but he made no comment to me at all.

MR. HOULIHAN: Thank you. I have no further questions.

CROSS EXAMINATION

BY MR. LEVY:

Q Did you help your partner in search of Mr. Conlin?

A Yes, I did, sir.

Q In that search, did you look in his briefcase?

A I don't recall looking in his briefcase.

Q Did any of the parts of the papers shown in Exhibit G-50 come from his briefcase?

A Not to my knowledge, sir, no.

Q And you are telling us that you saw Mr. Conlin with his briefcase open, taking and putting papers in and out of it, and you didn't search his briefcase?

A No, I did not say that, sir. The briefcase was not opened. The briefcase was being held in front of him (indicating), shielding his actions, obviously.

Q So you never looked in his briefcase, to your memory?

A I didn't, no, sir, but it would certainly be natural when you arrest a person who has a briefcase to examine that briefcase.

Q But you didn't do it?

A No, I don't have a recollection of it, sir.

Supreme Court, U. S.
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No. 76-1753

In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER R. CONLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of eight counts of willfully preparing false income tax returns for other persons, in violation of 26 U.S.C. 7206 (2); one count of destroying tax returns filed with the Small Business Administration, in violation of 18 U.S.C. 2071(a); and one count of submitting to the Small Business Administration a copy of a false income tax return, in violation of 18 U.S.C. 1001 (Pet. App. A-5). The district court sentenced petitioner to concurrent terms of two years on each of the ten counts, which it suspended, and placed petitioner on probation for two years (Pet. App. A-2). The court also fined petitioner $1,000 on each of four counts involving preparation of false returns and also on the charge involving a false statement to the Small Business

Administration (Pet. App. A-2). The court of appeals affirmed (Pet. App. A-4 to A-12).

The evidence can be summarized as follows: In the aftermath of a hurricane, petitioner, a licensed public accountant, assisted many of his clients to obtain disaster relief loans from the Small Business Administration. On January 18, 1974, he accompanied a client named Thomas Gill to the Elmira, New York office of the Small Business Administration in order to meet with an official named James Cristofero. Cristofero testified that he showed petitioner and Gill copies of Gill's income tax returns which had been submitted to the Small Business Administration, on January 4, 1974, in support of Gill's application for a loan and requested assurance that the originals had been filed with the Internal Revenue Service (Pet. App. A-6). Cristofero then asked Gill to sign the copies as the taxpayer and petitioner to sign them as preparer, which they did. Cristofero then gave petitioner a memorandum stating that the Small Business Administration would verify the information on the returns with the Internal Revenue Service. Petitioner thereupon seized the signed copies and put them in his briefcase. Despite Cristofero's warning to petitioner that he was destroying government property, petitioner ignored Cristofero's demand for their return and began to tear them up and stuff the pieces in his clothing (Pet. App. A-6 to A-7).

Cristofero then summoned two FBI agents from the local office who witnessed petitioner destroying the documents. When the agents asked petitioner what he was doing he did not respond. About 30 minutes later, the agents arrested petitioner and gave him *Miranda* warnings. One of the FBI agents testified that about an hour after petitioner's arrest, petitioner suddenly and without solicitation broke his silence and stated that he and Gill had not submitted the destroyed documents

to the SBA on January 4, that instead he had brought them to the SBA on that very day, January 18. When the torn pieces were recovered and pieced together, it was discovered that they overstated the amount of Gill's disaster loss by more than $100,000 (Pet. App. A-7).

Petitioner's sole argument (Pet. 4-9) is that the trial court erred in permitting the introduction of testimony of his silence at the time of his arrest. The first mention of petitioner's silence came during the direct examination of Cristofero regarding events preceding the entry of the FBI agents. Cristofero testified that while petitioner was tearing up the tax returns he asked petitioner what he was doing and advised him that destroying government documents was a crime, and that petitioner said nothing (Tr. 59).[1] During the cross-examination of Cristofero, petitioner's counsel repeatedly asked him whether it was true that from the outset petitioner told Cristofero that he had brought the documents with him to the office that day and that he intended merely to leave with what he had brought (Tr. 114-116). This was the version later testified to by petitioner himself (Pet. App. A-8), a version foreshadowed not only in the cross-examination of Cristofero but in the opening statement of petitioner's counsel to the jury, in which he stated that there would be a question raised "as to who actually owned these documents * * * and who had a right to these papers on that day" (Tr. 18). When it became clear that petitioner was adopting the position that the

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[1] "Tr." refers to the trial transcript.

Petitioner does not appear to object to the admission of Cristofero's statement on direct examination that petitioner said nothing when asked what he was doing at the time he was tearing up the tax returns. This testimony described the events relating to the commission of the crime and petitioner's silence was therefore part of the *res gestae* of the offense.

documents he destroyed were those that he had brought on January 18, the prosecutor sought to elicit testimony that would refute that version of the facts. One of the FBI agents testified that when he and the other agent arrived at the Small Business Administration offices, they asked petitioner what he was doing, that he did not respond, that he was then arrested and given his *Miranda* rights, and that he continued to remain silent. The other FBI agent corroborated that testimony but stated that, about an hour after his arrest, petitioner voluntarily broke his silence and offered his exculpatory version of the events (Pet. App. A-8).

The court of appeals correctly held that the testimony concerning petitioner's silence was properly admissible. As the court of appeals stated (Pet. App. A-8), petitioner's "contentions concerning the making of exculpatory statements raised an issue which the Government was entitled to meet." Petitioner advanced the theory that he had spoken in an exculpatory manner throughout the incident; "having thus raised the question * * *, [petitioner] opened the door to a full and not just a selective development of the subject." *United States* v. *Fairchild*, 505 F. 2d 1378, 1383 (C.A. 5).

Doyle v. *Ohio*, 426 U.S. 610, upon which petitioner relies (Pet. 6, 7-8), is distinguishable. In *Doyle*, the defendants took the stand and gave an exculpatory story that they had not previously told to the police or the prosecutor. The prosecution thereafter cross-examined as to why they had not given the arresting officer the exculpatory explanations. The Court held that the prosecutor's use for impeachment purposes of the defendants' silence at the time of arrest and after they received *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment. The Court stated that "every post-arrest silence is insolubly ambiguous because of what the State

is required to advise the person arrested" (426 U.S. at 617-618).

But the Court explicitly recognized in *Doyle* "that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest" (426 U.S. at 619-620, n. 11). That is precisely the situation here. Petitioner claimed at trial that he had spoken throughout the episode and that he had told both Cristofero and the FBI agents that the documents he had destroyed were those that he had brought with him on January 18. Under these circumstances, the prosecutor could introduce evidence as to petitioner's silence to show that he had made no such claim during the episode. While the better course for the trial court would have been to caution the jury that evidence of petitioner's silence was admitted solely to rebut his version of the event, the court of appeals properly held that the admission of the evidence did not deprive petitioner of a fair trial (see Pet. App. A-8).[2]

Petitioner argues (Pet. 7-8) that before the testimony concerning his silence could be admitted it would have been necessary for him to testify that he had told Cristofero and the FBI agents from the outset that he had brought the documents with him that same morning. Thus, in petitioner's view, the testimony would be admissible only as rebuttal evidence by the government. But whether the defense position is made clear by testimony of the defendant himself or by repeated cross-examination of

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[2]*Grunewald* v. *United States*, 353 U.S. 391, and *United States* v. *Hale*, 422 U.S. 171, upon which petitioner also relies (Pet. 6), are likewise distinguishable. They do not involve a situation in which the defendant "opens the door" to the introduction of testimony concerning his post-arrest silence.

a government witness (Tr. 114-116), the result is the same. The government has a right to meet a contention, whether it is made directly or indirectly.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[3]Petitioner also argues (Pet. 2, 5) that the government should not have brought out the fact that petitioner requested counsel from the outset. But the record shows that it was petitioner's counsel, not the government, who first brought out that fact (Tr. 115-116; Pet. App. A-24 to A-25).